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Supreme Court of the United States

JUNE TERM, 1969

No. [redacted]
203

ROBERT A. MOSES AND RICHARD P. MOSES, EXECUTORS OF THE ESTATE OF MRS. MIRIAM B. MOSES, DECEASED,

PETITIONERS

versus

THE MANUFACTURERS LIFE INSURANCE COMPANY,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

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ROBERT A. MOSES AND RICHARD P. MOSES, EXECUTORS OF THE ESTATE OF MRS. MIRIAM B. MOSES, DECEASED,

PETITIONERS,

versus

THE MANUFACTURERS LIFE INSURANCE COMPANY,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Executors of the Estate of Mrs. Miriam B. Moses, Deceased, as Petitioners, hereby petition this Honorable Court to issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit adverse to them and entered March 10, 1969.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit affirming the Order of the District Court for the District of South Carolina granting judgment notwithstanding a jury verdict for Petitioners is dated March 10, 1969 and reported as *Moses v. Manufacturers Life Insurance Company*, 407 F. (2d) 1142, and printed in the Appendix hereto at page 38.

The Order of the District Court filed April 30, 1968, is reported as *Moses, et al v. The Manufacturers Life Insurance Company,* F. Supp. , D. C. S.C., 1968, and printed in the Appendix at page 27.

JURISDICTION

The decision sought to be reviewed was filed March 10, 1969.

The jurisdiction of this Court to review that decision by Writ of Certiorari is conferred by 28 U.S.C., Section 1254 (1) and 28 U.S.C., Section 2101 (c).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Courts below in a case which upon its particular facts is one of first impression have effectively deprived these Petitioners of the Seventh Amendment Constitutional guaranty of trial by jury by granting and affirming judgment notwithstanding the verdict of the jury despite substantial evidence adduced upon the submitted issues of duties owing their testatrix and breach thereof causing damage; therefore requiring issuance of a Writ of Certiorari to review same and ultimately requiring reversal and remand for reinstatement of the judgment on the verdict or for a new trial.

2. As an alternative question for review, whether the Court below so erroneously affirmed the commission of such prejudicial errors committed during the course of the trial by exclusion of evidence, refusal of instructions, and limitation upon damages as to have so effectively denied Petitioners a fair trial as to require such review and ultimate reversal and remand for a new trial.

CONSTITUTIONAL PROVISION INVOLVED SEVENTH AMENDMENT

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

The facts material to the consideration of the questions presented and which are either admitted, uncontested, or accepted as true in considering them in the light most favorable to the Petitioners are as follows:

On December 12, 1949, Mrs. Miriam B. Moses was issued a contract by the Respondent called a Guaranteed Retirement Pension Plan for an annual premium of $1,014.90; and for a period of 16 years she continued her relationship with the company not only by paying to it approximately $16,000.00 through the year 1965; but also through correspondence and the seeking of advice. Under the policy after an extension in 1960, she was to receive $87.63 per month for life beginning December 12, 1965, the maturity date, with that amount guaranteed to her estate or beneficiary for a minimum of ten years in the event of her death after maturity; and in the event of her death prior

to the maturity date, Respondent would pay the greater of the sum of the premiums paid in or the stated cash value of $18,410.00 to her named beneficiary or to her Executors as may be applicable.

The contract had on its face in bold type and enclosed in a black border entitled "IMPORTANT" the following (Printed in Appendix at page 39):

"IMPORTANT

When it is desired to obtain payment of any benefit under this contract write direct to the Manufacfacturers Life Insurance Company, Toronto, Canada, or communicate with the nearest authorized representative of the Company. By so doing time and expense may be saved, as the Company will furnish, free of charge, the required forms for completion together with any necessary advice and instructions.

Making a change in a contract or replacing a contract by a new one does not usually result in any advantage to the holder of the contract. The Company strongly urges that, before taking any action in regard to a contemplated change in, or replacement of, this or any other contract, the counsel and advice of the Company which issued the contract should be secured."

By letter dated August 23, 1965, (Trial Exhibit 2-C) she wrote the Company requesting information and advice and among other things stated: "I am totally unfamiliar with these things and I thank you for your help". The Company, after acknowledging her letter, wrote on September 9, 1965 (Trial Exhibit 2-E) and in this letter among other things gave her erroneous and false information when it asserted "If you elect to receive income on a quarterly

or annual basis, the income will be greater than if you receive the income on a monthly basis." Arithmetic shows the reverse to be true in each instance cited in the letter. It also set forth options not in the contract and which if selected would result in a change or addition to the policy.

On November 21, 1965 (Trial Exhibit 2-G) she again wrote the Company pointing out "I was hospitalized through September . . . " and she asked for advice concerning certain unguaranteed options, saying especially " . . . but wish to know advantages and/or disadvantages of one over the other".

The Company only wrote the letters in evidence and admittedly gave no advice or counsel and recommended no course of action. It had an agent in Sumter, South Carolina, Mr. Thomas Dabbs, CLU, but she did not know it; and the Company had never requested him to see, talk to, consult with, or advise her about her contract or the matters in correspondence. The Company letterheads showed the Chartered Life Underwriter designation.

Previously during September, 1965, Mrs. Moses, a widow, and almost sixty years of age, had been hospitalized as the result of radical face and neck surgery for a malignant cancer. The scars and results of the operation were readily visible; her speech was noticeably affected therefrom; she was in ill health, and her living habits worsened, again all apparent and visible, and all of which could have been seen by Respondent or its agents and taken into consideration. Although she had been a writer and had done some teaching, she had always been a poor business woman.

On November 30, 1965, for reasons not known she exercised the option first advanced in the September 9th

letter to take $104.94 per month, unguaranteed, instead of selecting $102.54 per month, which was guaranteed in all events for at least ten years, and in lieu of taking $18,410.00 cash, which had vested, and in lieu of her other vested contractual benefits which might be more beneficial. The options from which she ultimately chose, and which were presented by the Respondent, were not in the contract, and represented making a change in the contract. Financially speaking, she was not in need of $2.40 extra per month at the risk involved.

Mrs. Moses received seven checks of $104.94 each for the months of December, 1965, through June, 1966, totalling $734.59. On June 12, 1966, she died from a malignancy which had spread to her brain. The Company refused further payments to the Executors, the Estate being the Beneficiary, and suit was filed for actual and punitive damages in the State Court but removed upon diversity and requisite amount to the United States District Court for South Carolina.

It was shown at trial arithmetically that had no changes been made in the contract as it stood, she and her estate would have received over a period of ten years between $10,515.60 and $11,700.00, depending on the interest accumulations. The election which the company allowed or permitted her to make without advice, counsel, recommendation, or word of caution not only caused her and the estate to lose the above sums, but also to lose the cash value of $18,410.00, of which approximately $16,000.00 represented her funds which they had been holding and investing for a period of sixteen years, thereby permitting them to add to their general fund $17,675.00 (considering the $784.58 paid).

There was abundant evidence introduced showing cor-

respondence and contract between Mrs. Moses and the Company during the sixteen years of premium payment. The only testimony for the company was that of an actuary, which had no bearing on the issues. At all times the Company admitted it gave no advice, counsel, or recommendations of any kind.

The Petitioners attempted to introduce testimony and evidence concerning the ethics and standards of conduct in the insurance-annuity industry through live witnesses and written Code of the Chartered Life Underwriters in order to give a further basis for a norm by which the court and jury could measure reasonable conduct and due care. All such testimony and evidence was ruled out, although offers of proof thereon were made and are in the record. In addition, the Court declined certain requested instructions on behalf of the Executors, declined to submit punitive damages, and declined to permit the jury to consider loss of the cash value of the policy as damages.

For ease of determination of damage after punitive and larger damages were excluded, and to prevent confusion among the jurors, counsel agreed to have the Court permit a finding as to a monthly sum ranging from a minimum of $87.63 to $102.54 if a verdict were found for the Executors, which they would thereafter have actuarily computed. A jury verdict was found for the Petitioners for $87.63 per month for ten years, afterwards computed to be $8,702.02.

Upon motion by Respondent, and after argument, judgment notwithstanding the verdict was ordered on April 30, 1968. The United States Court of Appeals for the Fourth Circuit affirmed on March 10, 1969, 407 F. (2d) 1142. This Petition now seeks review and ultimate reversal of the said judgments and Orders of the Courts below.

ARGUMENT

1. Petitioners are informed and believe that the actions of the Courts below in granting to Respondent and sustaining a judgment notwithstanding the verdict of the jury have so invaded the province of the jury, have so infringed upon Petitioners' rights under the Seventh Amendment of the United States Constitution and applicable decisions of this Honorable Court, and have therefore so departed from the usual and accepted course of proceedings in a jury trial, as to call for and require an exercise of this Honorable Court's power of supervision, review and decision.

The Seventh Amendment printed, supra, page 3, provides " . . . and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law".

Because of the important role prescribed for the jury in our Federal system of jurisprudence this Court has said clearly as in *Atlantic & Gulf Stevedores Inc. v. Ellerman Lines,* 1962, 369 U. S. 355, 359, 360, 82 S. Ct. 780, 783, 784, 7 L. Ed. 2d 798, rehearing denied, 369 U.S. 882, 82 S. Ct. 1137, 8L. Ed. 2d 284:

" . . . But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them."

"This suit being in the federal courts by reason of diversity of citizenship carried with it, of course, the right to trial by jury . . . . Thus, the provisions of the Seventh Amendment, noted above, are brought into play. As we recently stated in another diversity case, it is the Seventh Amendment that fashions 'the federal policy favoring jury decisions of disputed fact questions'. *Byrd v. Blue Ridge Rural Elec. Cooperative,* 356 U. S. 525, 538, 539, 78 S. Ct.

893, 901, 2 L. Ed. 2d 953." (At 356 U. S. 539, 78 S. Ct. 901, appears the following: "An essential characteristic of that (Federal) System is the manner in which in civil common-law actions, it distributes trial functions between judge and jury and, under the influence — if not the command — of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury"),

Hence, from this Constitutional command come the stringent considerations and requirements placed upon the Federal Judiciary when entertaining motions for judgments notwithstanding the verdict of a jury. For example, in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 1962, 370 U.S. 690, 696 n. 6, 82 S. Ct. 1404, 1409 n. 6, 8 L. Ed. 2d 777, this Court said "The Court of Appeals was, of course, bound to view the evidence in the light most favorable to Continental (Petitioner) and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn. . . . ".

Note 6. "As Professor Moore has indicated, 'In ruling on the motion (for directed verdict) the trial court views the evidence in the light most favorable to the party against whom the motion is made. On appeal, likewise, the Appellate Court must consider the evidence in its strongest light in favor of the party against whom the motion for directed verdict was made, and must give him the advantage of every fair and reasonable intendment that the evidence can justify.' (Citations omitted)"

And in *Hawkins v. Sims*, 4th Cir., 1943, 137 F. (2d) 66, 67: " . . . Where there is substantial evidence in support of Plaintiff's case, the Judge may not direct a verdict against him, even though he may not believe his evidence or may think that the weight of the evidence is on the oth-

er side; *for under the constitutional guaranty of trial by jury, it is for the jury to weigh the evidence and pass upon its credibility . . .* " (Emphasis added)

Hence, with these basic Constitutional guaranties and principles in mind, Petitioners believe they can clearly show that when the evidence adduced at the trial is considered in the light most favorable to them and then adapted to the law applicable to the issues of duty, breach, cause, and damage, these issues were properly submitted to the jury and that the Courts below have erred in their invasion of the Jury's province.

It must be kept in mind that this action was tried before a United States District Judge and a jury seeking *damages* at law, (not recission in equity), for the failure of Respondent to use a standard of care or conduct required of it by the language of the policy, its relationship to the insured, and other facts of the case, thereby directly and proximately causing loss or damage. Although the Complaint sounds in tort, whether it be considered in tort or contract, at all times the issues at the trial were those of duty, breach, causation, and damage. That was so understood at the time by the trial Judge. (See colloquy in note of Order of April 30, 1968, App. Page 32) And those issues were in fact the basis of his instructions to the jury.

This case is singularly different from all others reported and factually one of first impression in that in no case cited by the Courts below or found by counsel are there any comparable set of facts upon which to apply the relevant legal principles. The evidence presented by Petitioners, essentially undisputed and deemed admitted, showed:

1. A contract issued in 1949 with the "black bordered language" prominently displayed thereon. (*In this regard*

it is important to keep in mind that neither counsel nor the Court below can discover a reported case dealing with this subject which has this particular factual element). (Emphasis added)

2. Sixteen (16) years of a relationship through correspondence on questions, requests for advices, and payment of annual premiums of $1,014.00. (None of the reported annuity cases have such a relationship).

3. Vested rights in Mrs. Moses to substantial funds at all times during the 16 years; at the maturity date, at which time Respondent held $18,410.00 of her money which they owed by contract to her or her estate; and even vested rights at death. (None of the reported annuity cases seem to have vested rights and in them *they seek recission and return of premium, not damages*).

4. The policy itself with language on the face saying "Guaranteed for Ten Years". (No reported case has this indication or promise).

5. The policyholder writing and asking for advice and help in connection with her vested funds as the maturity date approached. (No reported case has this element).

6. The policyholder writing and informing the insurer of a lengthy hospitalization and specifically asking advice and counsel. (In no reported case was the insurer specifically put on notice of the insured's debility and in no case found was there a specific request for advice and counsel. (The Court in *Rishel v. Pacific Mutual Life Ins. Co.* 1935, 10th Cir., 78 F. 2d 881, might well have reached a conclusion contrary to the Courts below in the instant case based on the notice here. (Please see Headnote 19 at Pages 887, 888.)

7. The insurer admittedly failing to take the least

step to contact her personally, talk to her, advise or counsel her, caution her, or make any inquiries of her, even though it had a highly qualified agent available, but unknown to her. (Again no reported case which has the black bordered language and above relationships.)

8. Her debility and worsening health and living habits which were immediately discernible with a minimal inspection or visit. (This element is highly lacking in the reported cases.)

9. Respondent permitting the insured to vary the options available by permitting her to choose an unbelievable and ridiculous option without any word of caution whereby for a possible gain of $2.40 per month, or about $288.00 over 10 years, a vested amount of $18,410.00 was divested. (No such gross element could be found in any reported case).

10. The Respondent supplying false and erroneous information in its letter of September, 1965. (No other reported case indicates this).

It hardly needs citation of authority to state that there is a duty upon all to exercise reasonable care not to injure another (*Ramey v. Carolina Life Insurance Co.*, 1964, 244 S.C. 16, 135 S.E. 2d 362;) that actionable negligence may be based on violations of duties arising out of contract as well as where there is no contract, being imposed by implication or operation of law, and may arise from the relation or situation of the parties. 65 C.J.S. *Negligence*, Sections 4 (2) through 4 (7); *Dean v. Hershowitz*, 1935, 119 Conn. 398, 177 A. 262 ;and that "When one undertakes a professional assignment, . . . he may incur liability in tort by reason of negligent performance. *Fireman's Mutual Ins. Co. vs. High Point Sprinkler Co.*, 266 N.C. 134, 146 S.E. 2d 53."

But, in addition to general legal principles which would place duties upon the Respondent to use due care generally in its relationship to Mrs. Moses and her vested funds which it had, there is the important "black bordered language", whereby in plain and simple language, it undertook to advise and counsel her. The language must have some meaning or significance or the Company would not have put it there. It can not simply be ignored, as the Courts below have done.

In South Carolina, "it is settled beyond cavil in this jurisdiction that the terms of an insurance policy should be construed most liberally in favor of the insured, and that in case of conflict or ambiguity, a construction will not be adopted that defeats recovery if the policy is reasonably susceptible of a meaning that will permit recovery. We uniformly give the insured the benefit of any doubt in the construction of the terms used in an insurance policy." *Hann v. Carolina Casualty Ins. Co.*, S.C. , S.E. (2d) Smith's Advance Sheet No. 16, Opinion filed April 23, 1969.

In *McKendree v. Southern States Life Ins. Co.*, 112 S.C. 335, 99 S.E. 806, 807 the Court said "The ordinary man who buys a policy would judge the clause in issue to mean that which the plain words of it imply, and especially is that true when those words, in the instant case, are printed in bold type . . . . "

In *Graham v. Business Men's Assur. Co. of America*, 10th Cir., 43 F. (2d) 673 that court had to determine whether "Full Indemnity" printed on the margin of application, not even on the policy, should be given effect to increase the recovery. In reasserting that the ambiguity created must go against the insurer, it said, apropros of the instant case:

"It may be that this phrase on the application was intended as advertising matter, but it takes the form of a promise, and *its prominence is an added reason for enforcing it* . . . ." (Emphasis added. Should not the prominence of the "black bordered language" be an added reason for at least saying Respondent had a duty to advise and counsel? Query also, whether the language on the face "Guaranteed Retirement Pension Payable for at Least Ten Years" creates a sufficient ambiguity to require enforcing that specific jury finding?

But there is yet further judicial authority to show that the evidence created a duty, the case of *Guardian Life Ins. Co. of America v. Brackett* 27 N. E. (2d) 103 where the following language was on the policy:

"Notice: To collect the amount payable under this policy it is not necessary to employ any person, firm or corporation." With that language, in no way as strong as on the instant case, that Court said at page 109:

> "This endorsement was, no doubt, for the purpose of assuring the policy holder his interests would be cared for by the insurer, and that he need not expend money for counsel relative thereto. The policy holder had a right to rely upon the endorsement, and, no doubt, did so rely thereon when he purchased the policy, and under the facts found by the court that appellee informed the district agent of appellant, while said policy was in full force, that he had suffered a sunstroke, had been sick and wanted to cash his policy, that, under the circumstances, was a sufficient notice to place on appellant the duty to investigate the same, and in the fulfillment of the obligations created by the policy and the endorsement it was duty bound to investigate further, and had such further investigation been made, full information would have been received relative to

total disability, and appellant is held to have received such due proof as it would have discovered had it made such investigation."

It is important at this point to direct the Court's attention to the question of "fiduciary relationships or duties" since that was heavily adverted to in the Order for judgment n.o.v., and because it has a bearing on the degree of due care and attention owed by Respondent to Mrs. Moses. As Petitioners have shown, the Respondent owed her duties not only by common law principles, but also by virtue of the "black bordered language". In addition, Petitioners feel, and even sought instructions which were refused, that the facts were sufficient for a finding that there was a fiduciary relationship with its higher degree of duties owed and which might have warranted a larger verdict had it been submitted.

South Carolina follows the general rule that whether there is a fiduciary relationship is in each case a question of fact. *Devlin v. Devlin*, 1911, 89 S. C. 268, 71 S. E. 966. 36A C.J.S. *Fiduciary*, p. 387, citing a multitude of cases asserts:

> "The existence of a fiduciary relationship is not dependent on nomenclature or on the establishment of any particular relationship, and while it may be found to exist in any legal relationship, its existence does not depend on some technical relation created or defined in law. Thus a fiduciary status or relationship may exist as a matter of fact where it would not otherwise be inferred from the mere relationship of the parties, and although the relationship which does exist does not fall within any of the familiar forms."
>
> " . . . It is in each case a question of fact, for the law regards the real, rather than the nominal, condition. . . "

"A fiduciary relationship is not limited to legal and technical relations, and it is not necessary that the relation and duties involved be legal; they may be either moral, social, domestic, or merely personal . . . "

The issues and the case itself are apparently sloughed off merely by reference to *Rishel v. Pacific Mutual Life Ins. Co.*, 10th Cir. 1935, 78 F. (2d) 881, wherein it is stated at p. 886:

"While insurance contracts are *uberrimae fidei, Stepcich v. Metropolitan Ins. Co.*, 277 U. S. 311, 48 S. Ct. 512, 72 L. Ed. 895, an insurance agent does not stand in the relationship to his customer that a lawyer does to his client or a father to his son . . . . The law does not cast upon insurance companies the affirmative burden cast upon trustees who deal with the property of their cesturis."

That is certainly not authority for an assertion to the End of Time that there could not be a finding of fiduciary relationship between the Respondent and Mrs. Moses under the facts of this case. The facts determine that issue, and the facts are for the jury. (As a matter of definition *uberrimae fides* is nearly synonymous with a 'fiduciary relationship' being defined in Black's Law Dictionary p. 1181 "the most abundant good faith; absolute and perfect candor or openness and honesty; the absence of any concealment or deception, however slight."

But it is not overly important to the action for damages, except as it might have increased damages, whether the duties to Mrs. Moses were plain simple duties to advise and counsel or whether they were fiduciary duties. The whole point is that there was abundant evidence for the jury to have found duties owing under the instructions as submitted.

The substantial evidence, in addition to warranting a finding of duties owed to advise and counsel, whether they be simple duties or fiduciary duties, likewise are sufficiently substantial for the jury to have made a finding of breach thereof causing damage.

The evidence showed her various vested rights; that Respondent proposed a change in the policy benefits; that she advised of lengthy hospitalization and asked advice and counsel to learn "advantages and disadvantages" of taking $102.54 per month for life guaranteed for 10 years as against $104.94 to cease at death.

Respondent admitted at all times at the trial and upon Appellate argument that it did not advise, counsel, caution, or recommend, as these terms are defined, but merely supplied information and accepted her choice (some of the information being in fact false).

The evidence also showed that Respondent knew of her hospitalization and therefore had notice to put them on inquiry (*Guardian Life and Rishel) Supra;* that it had an agent who was a Chartered Life Underwriter readily available in Sumter to confer with her, although she did not know it; that it did not request him to confer with her, did not make further inquiry or obtain further information as to her health, did not inquire or obtain information as to her living habits, her financial needs or business ability, her wants, or her kin.

The evidence further showed that had the Respondent looked it would have discovered a woman recovering from a serious operation to her face and neck with speech impaired; that if it had inquired it would have learned that she had had a malignant cancer removed and was not in good health; if it had inquired it could have discovered that while her living habits were eccentric, she was not in need

of a mere $2.40 per month in relation to endangering the vested lump sum or guaranteed benefits involved.

It is said that the evidence also showed that she knew of her own physical condition and financial situation. But what of that! Are these not factors for the jury to weigh, and not for the trial Judge? Could not the jury have reasonably determined that what she knew was of no significance, because when she had asked Respondent for advice as it had urged her to do, it then becoming its duty to learn her total situation in order to advise and counsel, which it then failed to do or do properly?

How can evidence be adduced in any case which could be more substantial so as to require submission to a jury which is the final arbiter of breach of duty, causation, and damage? Do not these facts entitle a jury to determine whether the Respondent rendered her the "counsel and advice" which it asked her to seek from it, and which it therefore owed to her by virtue of the lengthy relationship, possession of her funds, and the "black bordered language"?

Are these not sufficient substantial facts from which a jury could weight and determine whether Respondent acted as reasonably and prudent as it should have under the circumstances and relationship; and if Respondent had not so acted, then whether its negligence or breach of duties had caused damages, there being substantial evidence of amounts available and lost from which this could be computed.

Under stringent and restrictive instructions based upon the theory of duty, breach, cause, and damage, the District Judge submitted the matters to the jury, as was definitely proper then and which should be so declared now.

Unfortunately until now, by the judgment n.o.v., the District Court with approval of the Court of Appeals has been permitted to change the theory of the action from one for damage to an imagined one to set aside an election, equitable in nature, and then to substitute his opinion as to the weight, credibility, and total significance of the substantial evidence. Certain instances in which the trial court invaded the jury's province by his Order are apparent, including findings that "advice" and "counsel" do not mean Respondent had to do any more than give information; that it was immaterial that she put Respondent on notice of her serious hospitalization or that she asked for advice; that it did not have to investigate anything. As additional proof that His Honor took upon himself to determine and weigh the evidence, he found:

(1) "Her letters to the Defendant, incorporated in the record herein, indicate she understood the several alternatives available to her by way of settlement of her annuity contract, etc." As to this, in the letters she said, "I am totally unfamiliar with these things, and I thank you for your help".

(2) "She clearly knew what unguaranteed meant when she made her choice". As to this, in the letter she said, "I simply do not know what the word 'unguaranteed' covers or doesn't cover".

Was it not therefore for the jury to weigh and determine her understanding or lack of it?

Again the Court found: "The Defendant answered the inquiries of the annuitant fairly and truthfully". As to this, it was undisputed that it gave her certain false and erroneous information. Was this not also for the jury in its deliberations as to the total factual situation?

Hence, upon the foregoing, Petitioners contend that they were constitutionally entitled to a trial by jury; that they adduced more than substantial evidence to require submission to the jury; that the District Court was correct in so submitting the issues of duty, breach, causation, and damage; and that to permit the judgment n.o.v. to stand under the facts and circumstances of this case is to violate their Seventh Amendment rights and the mandate thereof proscribing the reexamination of the facts once tried by the jury.

The Writ of Certiorari should issue so that in the end the jury's verdict should be reinstated or a new trial ordered.

2. Should this Court feel that the Petitioners are not entitled to reinstatement of the judgment upon the jury's verdict, it is their alternate position that the judgment *n. o.v.* granted and approved below, should nevertheless be reversed and the action remanded for a new trial based upon errors so substantially prejudicial to the Petitioners committed by the District Court during the trial by the exclusion of evidence, refusal of instructions and limitations upon damages as to call for an exercise of the Honorable Court's power of supervision.

A. Exclusion of Evidence.

In order to lay a firmer foundation for the Court and jury to have a norm to measure duty and reasonable conduct on the part of the Company, Petitioners attempted to adduce testimony of agents trained in the life insurance and annuity field, as well as eliciting their opinions on reasonable course of conduct and relations which companies today have in carrying out their duties to their policyholders and insureds. In addition, evidence was of-

fered of a professional Code of Conduct and Ethics followed by agents professionally trained and designated Chartered Life Underwriter as well as the companies with which they are associated. The proferred testimony, hypothetical questions, opinions, and evidence are in the record. It was all highly relevant and material, especially that concerning Chartered Life Underwriters. The Respondent's letterheads carried the designation C. L. U. and this standard of ethics would have shown the high duty, even aside from the "Black bordered language", which was owed to Mrs. Moses by virtue of an industry standard of conduct to which the Company has ostensibly subscribed and imposed upon itself and from which the jury might reasonably have found duty to advise and counsel after full investigation and higher damages.

GUIDES TO PROFESSIONAL CONDUCT

"1. I shall, in the light of all the circumstances surrounding my client, which I shall make every conscientious effort to ascertain and to understand, give him that service which, had I been in the same circumstances I would have applied to myself.

"2. I shall place the welfare and interests of my clients above my own interests.

"3. I shall render continuing service and counsel to my clients."

The testimony and evidence was also highly competent since one qualified as an expert may render an opinion. *State v. King,* 158 S. C. 251, 155 S. E. 409. *Atlantic Coast Line R. R. Co. v. Columbia Salvage,* 138 S. C. 113; 135 S. E. 877 and standards of due care and proper conduct and of custom and usage in a particular business or industry are admissable. *Rhodes v. Dukes,* 128 S. C. 354, 122 S.

E. 872, 32 C. J. S. *Evidence*, Sections 546 (71) page 284; 546 (76) page 298, 546 (79) page 302.

Despite this, the Court below excluded the evidence and *would not even permit cross examination of Respondent's* one witness concerning "C.L.U." and its standards and ethics. All of this certainly was prejudicial to Petitioners. (Emphasis added)

B. Refusal To Charge.

Additional prejudice resulted in the refusal of Petitioner's requested instructions dealing with fiduciary relationships, duties, reasonable care, proximate cause and definitions of "advice" and "counsel". Sufficient discussion has been had in the argument to substantiate the relevancy, materiality, and competency of the requested instructions. Had the jury had the opportunity to hear these matters from the Court as guidelines, it might well have felt there was a more serious breach of a higher duty and made a higher award.

C. Limitations On Damages.

Lastly, it is submitted that the Court below committed prejudicial error by so greatly limiting the scope of damages. It must again be said that the action was not to set aside the election, but based upon breach of duty and damages therefor. At no time did Petitioners reduce the scope of the action. At Chambers His Honor stated he would not submit punitive damages since he did not consider it a tort action. Nothing further was said and no formal concession was made. He did not instruct thereon. Likewise, he did not permit the jury to consider whether lack of proper advice

caused loss of the cash value of Eighteen Thousand Four Hundred Ten ($18,410.00) Dollars; and no concession or reduction in demands were made as to that although it was discussed at Chambers: It must be realized that in the midst of a trial, when a judge has affirmatively indicated his views, the trial lawyer must take that into consideration in his manner and tactics, lest he cause the Court to become more adverse and cause his client to suffer therefrom. Unfortunately, informal conferences at Chambers establish certain guidelines, but are not in the record and not subject to review. In any event, while Petitioners believe they were prejudiced by the Court not giving the jury greater leeway, they would accept reinstatement of the verdict as stated before; but if a new trial be ordered, they would feel it only proper that they not be so limited in the range of recoverable damages.

CONCLUSION

Petitioners respectfully submit that under the peculiar facts of this case and the law applicable that their Constitutional guaranty of a trial by jury, free from prejudicial errors, would be highly infringed unless this Honorable Court exercises its power of supervision and review by granting this requested Writ of Certiorari to the Court of Appeals for the Fourth Circuit to the end that hopefully they may see reinstatement of the verdict of the jury of peers who saw the witnesses, heard the testimony, viewed the evidence, and rendered their collective decision; or for a new trial.

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Sumter, South Carolina,
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of Counsel.

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Moses, et al., Petitioners, v. Mfgs. Life Ins. Co., Respondent

UNITED STATES DISTRICT COURT, D. SOUTH CAROLINA COLUMBIA DIVISION

April 30, 1968

Following denial of its motion for a directed verdict and a jury verdict in plaintiffs' favor, the defendant has renewed its motion by way of motion for judgment *n. o. v.* In considering such motion for judgment in accordance with the defendant's prior motion for direction of verdict, all issues of fact, as well as inferences therefrom, are to be viewed in a light most favorable to the position of the plaintiffs. Fortunately, for purposes of this motion, there is no real dispute of fact involved.

Some twenty years prior to her death, the testators' testatrix purchased an annuity contract of the defendant. Such annuity contract, as extended, matured on December 12, 1965. At maturity, the contract provided certain alternative methods of settlement, exercisable at the sole option of the annuitant. Among such alternatives were (1) a single, flat cash payment, (2) a fixed monthly payment to the annuitant for life without other benefits, or (3) a fixed monthly payment to the annuitant for life, but, in any event, guaranteed for ten years. There was a small difference in monthly payments between the two latter alternatives.

Some months before, and in anticipation of, the maturity of the contract, the testatrix-annuitant wrote the defendant (a Canadian corporation):

"A few years ago we were in correspondence about

the above annuity policy which I extended and expanded (Dec. 60 to Dec. 65).

"Since I have no desire to drive right up to the closing date, I thought some authorization might be made now, effective on the maturity date which is, I believe Dec. 12, 1965.

"I should like a straight annuity (10 year guarantee) which I believe is the usual contract.

"Will you be kind enough to tell me:

"a. Is income paid monthly, quarterly or annually, an dis there any difference in the annual amount, or is there a charge for frequent payments which does not prevail on an annual payment?

"b. Is there any difference in the amount if I do not elect the 10 year guarantee, but just keep it a straight annuity, ceasing at my death?

"c. Is the figure of $87.63 (a figure given Nov. 29, 1960) still accurate, or has there been any change?

"Any information you can give me about this would be appreciated. Also any other information which you feel is pertinant and which I should have would be more than welcome.

"I am totally unfamiliar with these things, and I thank you for your help."

By reply of September 9, 1965, the defendant first pointed out to the testatrix-annuitant that at its maturity the cash value of her annuity would be $18,410. It then, in response to the annuitant's specific inquiry, gave the different monthly sums which would be paid if the annui-

tant chose to take settlement in the form of either monthly income for life unguaranteed or monthly income for life but guaranteed, in case of annuitant's earlier death, for ten years.

Following receipt of this letter, the testatrix-annuitant wrote the defendant on November 21, 1965, inquiring specifically as to the meaning of the word "unguaranteed." She states that she is interested "in either the 104.94 (unguaranteed monthly)or the 102.54 (monthly guaranteed 10) but wish(ed) to know the advantages and/or disadvantages of one over the other."

The defendant's reply to this inquiry was, in part:

"In reference to your letter of Nov. 21st, I wish to to advise you that if you select $104.94 a month unguaranteed under the alternate basis this means that you will receive a monthly income for as long as you live, but upon your death no monthly income payments will be paid to a beneficiary.

"If you select $102.54 monthly with a Ten Year Certain guarantee that means that you will be paid a monthly life income until the time of your death. However, should you die within the first 10 years of receiving monthly income payments, the payments will continue for the balance of the 10 year period to your named beneficiary."

change?

The testatrix-annuitant thereupon signed her option selection, designating "Option Selected Life Pension, Unguar. as indicated in correspondence." The option form, also, was checked opposite the choice described as "(2) Payable for life without refund on Annuitant's death."

It is clear from this correspondence (which, incident-

ally, represented the only communication between the annuitant and the defendant relevant to the subject of this action) and from the option selection form, that the testatrix-annuitant freely and of her own volition chose a monthly payment, for her life, without guarantee for any payment beyond her own life. After receiving seven monthly payments under the form of settlement chosen by her, she died on June 12, 1966. The plaintiffs, who are the executors of her estate, then filed this suit for the purpose of voiding the election made by the testatrix-annuitant herself and of recovering at least the amount which would have been received by them as executors, if their testatrix had elected to take a "guaranteed" form of settlement.[1]

To rescind and void the election made by the annuitant herself, it is necessary for the plaintiffs to establish: (1) That the annuitant was incompetent at the time she made her election; or (2) That her election was induced by fraudulent misrepresentation on the part of the defendant; or (3) That there was a fiduciary relationship between the testatrix-annuitant and the defendant and that it was the duty of the defendant as fiduciary to see that the election made by the testatrix-annuitant was the one most favorable to her, considering both her financial and physical condition.

The plaintiffs do not contend that the testatrix was of unsound mind. The extent of their testimony is that she was not skilled in business matters and often consulted her brother-in-law in connection with business matters. There was absolutely no evidence, such as that in *Allore v. Jewell*, (1876) 94 U.S. 506, 24 L. Ed. 260, that at the time she made her election she was "in a condition of great mental weak-

[1] In their original complaint, plaintiffs sought both actual and punitive damages. At the trial, however, they reduced the scope of their action to that stated.

ness." She was, it was conceded, a woman of talent, who had enjoyed a profitable career as a writer. Her letters to the defendant, incorporated in the record herein, indicate that she understood the several alternatives available to her by way of settlement of her annuity contract. They are not the letters of one who lacks the comprehension to understand her rights. She was clear in her own mind what type of settlement she wanted. There is thus nothing in this record to support the conclusion that the testatrix-annuitant's election should be voided for incompetency. *Hult v. Home Life Ins. Co.*, (1932) 213 Iowa 890, 240 N. W. 218, 223; *Richardson v. Travelers Ins. Co.*, (1912) 109 Me. 117, 82 A. 1005, 1008.

Equally untenable is any claim that the defendant was guilty of any deception or fraud in inducing the testatrix-annuitant to select the form of settlement that she did. The letters of the defendant show indisputably that it fairly stated to the testatrix-annuitant exactly what were her options. The plaintiffs point to no misrepresentation or concealment by the defendant, inducing the testatrix-annuitant in her selection.

The real heart of plaintiffs' claim is their contention that the defendant stood in a fiduciary relationship to the testatrix-annuitant.[2] Such claim of fiduciary relationship, however, cannot rest upon the mere relationship of insurer and insured. *Rishel v. Pacific Mutual Life Ins. Co.*, (C.C. A. Colo. 1935) 78 F. (2d) 881, 131 A. L. R. 414; *Stockett v. Penn Mutual Life Ins. Co.*, (1954) 82 R. I. 172, 106 A. (2d) 741; *Hult v. Home Life Ins. Co.* (1932) 213 Iowa 890, 240 N. W. 218, 228. The plaintiffs apparently recognize this and urge that certain language incorporated in a notice printed on the outside of the annuity contract created a fiduciary relationship between the testatrix-annuitant and the defendant. This language is:

"IMPORTANT

"When it is desired to obtain payment of any benefit under this contract write direct to the Manufacturers Life Insurance Company, Toronto, Canada, or communicate with the nearest authorized representative of the Company. By so doing time and expense may be saved, as the Company will furnish, free of charge, the required forms for completion together with any necessary advice and instructions.

"Making a change in a contract or replacing a contract by a new one does not usually result in any advantage to the holder of the contract. The Company strongly urges that, before taking any action in regard to a contemplated change in, or replacement of, this or any other contract, the counsel and advice of the Company which issued the contract should be secured."

In my judgment this language did not create a fiduciary relationship between the defendant and the annuitant.[3] When requested, the defendant was obligated to be accurate and fair in its advice and in the information it gave the annuitant. But this did not mean the defendant was required to go beyond the request of the annuitant for information, to inject matters not raised by the annuitant, or

[2] In fact, the plaintiffs planted their whole case on this theory during trial. In a colloquy with the Court, this was clearly stated. This colloquy was, as follows:

"THE COURT: As I construe the plaintiff's case, the only ground the plaintiff has for recovery is the contention that the language appearing on the face of the defendant's policy created some affirmative obligation on the part of the defendant to advise and counsel the plaintiff and that such advice and counsel involved an investigation of all of her circumstances, including her health, and that if such obligation had been fulfilled and such investigation had been made, the company, in good faith, would have been obligated to have advised her not to execute a new annuity contract because that's what it amounted to. So, the question, as I view it, narrows down to that. Have I stated the plaintiff's position?

"Mr. Wittenberg: Eminently.

"The Court: Very well."

to make independent inquiries into such extraneous matters, especially when these matters were well within the knowledge of the annuitant herself. Specifically, when the annuitant asked the difference in values between "guaranteed" and unguaranteed" methods of settlement, the defendant was under no obligation to make an independent investigation of the annuitant's health in providing an answer to such inquiry. The defendant answered the inquiries of the annuitant fairly and truthfully; it gave the differences in value between the two forms of settlement. That was the extent of its obligation. The defendant had a right to assume that the annuitant herself knew the state of her health; the record shows that the assumption was well founded. She neither sought information with respect to her physical condition from the defendant nor relied on any advice of the defendant in that respect.

Even if it be assumed that there was any duty on the defendant to investigate the annuitant's health, what information would have been secured by the defendant that the annuitant did not already have? The defendant could only have repeated to her the information already given her by Dr. Levi. The choice of settlements made by her was not made by her out of ignorance or misapprehension of her health. She knew fully the details of her cancer operation. See, *American State Bank v. National Life Ins. Co.*, (1938) 297 Ill. App. 137, 17 N. E. (2d) 256, 259-60.[4] Under such circumstance, when the annuitant filed her choice of settlement, it was the duty of the defendant to

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[3] The defendant has cited a number of authorities to the effect that such language set out on the outside of the policy, constitutes no part of the policy or contract.

[4] In this case, which was decided on the pleadings, the Court pointedly observed that the plaintiff had failed to allege "that the defendant had any knowledge of her physical condition which she * * * (the annuitant) did not or could not have had if she had so desired."

accept the choice.

The argument of the plaintiffs is very similar to that made in *Tabachinsky v. Guardian Life Ins. Co.*, (1956) 147 N. Y. S. (2d) 719. There, the executors sought to set aside an annuity contract, on the ground that, because of the annuitant's bad health, it was or should have been obvious to the defendant that the annuitant would not reach anywhere near her expectancy and that accordingly there had been a breach of a fiduciary relationship and an unjust enrichment of the defendant. The amounts involved were considerably more than those here and the disparity between costs of the annuity and actual benefits received by annuitant before her death comparable to that in this case. The Court dismissed the contention that the insurance company owed any duty to investigate the health of the annuitant with this observation from *Rishel v. Pacific Mutual Life Insurance Co., supra,* at page 888:

> "But in annuities, the annuitant is the one who is interested in knowing that his health is normal before entering into the contract; he knows or can ascertain the state of his own health, and there is no reason why an insurance company should require him to ascertain the condition of his own health before contracting with him."

In the *Rishel Case*, which involved an attack on an annuity similar to that presented herein, the Court denied the executor's action to recover, saying, (pp. 887-8):

> "An annuity contract cannot be avoided because the annuitant dies before attaining his average expec-

(p. 263). Such failure was regarded as fatal to plaintiff's right to rescind. In the present case, as I have pointed out, the defendant not only did not have any information with reference to the annuitant's health but, if it had fully investigated the annuitant's health, it would have had no more information than the annuitant herself already had.

tancy, or because it develops that his health was so impaired when the contract was written that his expectancy was less than the average. Annuity contracts could not be written by financially responsible companies if a recovery of the premium *pro tanto* could be had upon proof after death of some impairment of the organs when the contracts were written.

* * *

"Plaintiff's case comes down to the points that an insurance company bears a fiduciary relationship to applicants for contracts, (of annuity) and that a company must inquire, at its peril, into the health of an applicant for an annuity. We are not in accord with that view of the law and are cited to no authority so holding. On the whole case, therefore, we see no reason for overturning these contracts, fairly made, because Mrs. Tew (the annuitant) unfortunately died before she expected."

It is suggested by the plaintiffs that the defendant knew or was put on notice of the condition of the annuitant's health and that this circumstance burdened the defendant with the duty to inquire fully into such condition and fairly and fully to advise the annuitant of it before exercising her choice of option settlements. The only basis for this contention is the statement in the annuitant's letter of November 21, where, in explaining her delay in writing the defendant, she wrote that she had been "hospitalized." She did not indicate why she was hospitalized; nor did she intimate that she had not fully recovered. She was an intelligent woman in full possession of her faculties, as her letters abundantly demonstrated. The defendant had a right to assume she knew—as she admittedly did—what her physical condition was and the nature and char-

acter of the operation occasioning her hospitalization. It was under no duty to investigate such hospitalization. It had both a right and a duty to accept the election made by the annuitant[5] and it does not lie within the province of her legal representatives now to invalidate a choice she herself made, with full knowledge of her condition and without any coercion or inducement on the part of the defendant.

It is true that the defendant has profited from this settlement and that the annuitant's estate would have been better off had she exercised one of the other optional settlements available to her. This is not unusual in connection with annuity contracts.[6] If insurance companies never profited from an annuity contract, how could it afford to pay those whose lives exceeded the averages upon which their rates were based? The mere fact that an annuitant dies before reaching her expectancy can no more void the annuity than the opposite situation where the annuitant lives beyond the expectancy. Both are within the contemplation of the parties. See, *Carroll v. Equitable Life Assur. Society,* (D. C. Mo., 1934) 9 F. Supp. 223, 224.[7] Similarly, it is not for this Court to "second-guess" the testatrix. She apparently had her own reasons for the choice she made. She clearly knew what "unguaranteed" meant when she made her choice. The difference in monthly income between the guaranteed payment and the unguaranteed was not much but she deemed it sufficient to justify

[5] Cf., Fox v. Northwestern Mutual Life Ins. Co. (D. C. Idaho 1956) 136 F. Supp. 766, 768: "The insured was not obligated to exercise any of the options contained in said policy, but elected to do so. It must be kept in mind that it was his option, and not an option to be exercised on the part of the insurance company."

[6] Many instances may be cited to illustrate this. Thus in Davis v. Equitable Life Assur. Society (1939) 280 N. Y. 656, 20 N. E. (2d) 1017, the annuitant purchased a life annuity at a cost of $10,000. Before receiving a single payment under the annuity and five months after its issuance, the plaintiff died as a result of cancer. Rescission was denied

her choice and it is not for me or for the executors to decide contrariwise. She was apparently without blood relatives and it may have been her wish under such circumstances to obtain the largest possible safe income, without any responsibility of investment, for her lifetime. Whatever her wish, she was entitled to her own choice and it is my duty to respect that choice.

Sympathetic as I may be with the plaintiffs, I am of opinion that the motion of the defendant should be granted.

It is Accordingly Ordered That the motion of the defendant to set aside the verdict and the judgment entered thereon fo rthe plaintiffs, and for judgment for the defendant notwithstanding the verdict is accordance with defendant's motion for directed verdict is granted, and judgment for the defendant may be entered accordingly.

/s/ DONALD RUSSELL,

United States District Judge.

Dated:

Spartanburg, South Carolina,

April 29, 1968.

(Original Filed April 30, 1968. MILLER C. FOSTER, JR., CLERK.)

In Woolworth v. Conn. Mutual Life Ins. Co. (D. C. N. Y. 1939) 27 F. Supp. 732, the annuitant received annuity payments of $1,185.75 before his death. He had paid a premium of $25,000 for his annuity contract. Rescission was sought on ground that the annuitant was ignorant of his serious physical condition and that consequently the defendant had been unjustly enriched. Rescission was denied. As the Court said in Aldrich v. Travelers Ins. Co. (1944) . . . Mass. . . . , 56 N. E. (2d) 888, 889:

"It is difficult to see how any company could carry on an annuity business if the estate of the annuitant could rescind whenever it turned out that the condition of his health did not 'warrant a reasonable expectation of life.'"

See, also, Fox v., Northeastern Mutual Ins. Co., supra, at p. 769: " 'In the absence of fraud, mere inadequacy of consideration does not affect the validity of an annuity contract as such.' "

[7] In this case, the Court, in describing the annuity contract involved therein, said:

"Both of them (the company and the annuitant) made an investment. The company looked for its profits arising from the early demise of the annuitant. The annuitant looked for her profits in a long life and one that would extend beyond her 'expectancy.' The contract was beneficial to both parties. The company made the greater profit because of the early death of the annuitant."

OPINION OF THE COURT OF APPEALS MARCH 10, 1969

PER CURIAM:

The executors of Mrs. Miriam B. Moses, deceased, appeal from the entry of a judgment n. o. v. for defendant and certain evidentiary rulings made during trial in their suit against the insurance company, in which they sought damages for what by hindsight turned out to be an unwise and unprofitable election on her part to receive the proceeds of a retirement pension insurance policy as a straight annuity without any guarantee of minimum payment. Mrs. Moses died in June, 1966, approximately six months after having made the election.

We affirm the entry of judgment n. o. v. for defendant on the basis of the decision of the district judge. *Moses, et al. v. The Manufacturers Life Insurance Company,* —— F. S. —— (D. S.C. 1968). Our examination of the transcript of trial and pertinent authorities satisfies us that there was no error in the evidentiary rulings.

AFFIRMED.

IMPORTANT

When it is desired to obtain payment of any benefit under this contract write direct to the Manufacturers Life Insurance Company, Toronto, Canada, or communicate with the nearest authorized representative of the Company. By so doing time and expense may be saved, as the Company will furnish, free of charge, the required forms for completion together with any necessary advice and instructions.

Making a change in a contract or replacing a contract by a new one does not usually result in any advantage to the holder of the contract. The Company strongly urges that, before taking any action in regard to a contemplated change in, or replacement of, this or any other contract, the counsel and advice of the Company which issued the contract should be secured.

EMANUEL WAXBERG INSURANCE
270 SIXTH AVENUE NEW YORK N. Y.
COLUMBUS 5-6600

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THE COURT OF APPEALS
ARCH 10, 1969

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EMANUEL WAXBERG
INSURANCE
270 SIXTH AVENUE NEW YORK N Y
COLUMBUS 5-6600

THE
MANUFACTURERS LIFE
INSURANCE COMPANY
HEAD OFFICE, TORONTO, CANADA

MIRIAM B. MOSES
(ANNUITANT)

Pension: $50.00 per month
12/12/1960

Annual Premium $1,014.90

Due 12th December

* * * * * *

GUARANTEED
RETIREMENT PENSION

PAYABLE FOR AT LEAST TEN YEARS

NON-PARTICIPATING

AGENCY NEWARK

LIBRARY
ME COURT, U. S.

Supreme Court, U.S.
FILED
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A. CLERK

BRIEF FOR RESPONDENT

Supreme Court of the United States

OCTOBER TERM, 1969

No. [redacted]203

ROBERT A. MOSES AND RICHARD P. MOSES, EXECUTORS OF THE ESTATE OF MRS. MIRIAM B. MOSES, DECEASED,

PETITIONERS

versus

THE MANUFACTURERS LIFE INSURANCE COMPANY,

RESPONDENT

RESPONDENT'S BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

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AUTHORITIES

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Manaia v. Potomac Elec. Power Co., C. A. Md. 1959, 268 F. 2d 793, (4th Cir.), certiorari denied 80 S. Ct. 255, 361 U. S. 913, 4 L. Ed. 183.

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Neely v. Eby Construction Co., 386 U. S. 317, 18 L. Ed. 2d 75, 87 S. Ct. 1072.

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1488

ROBERT A. MOSES AND RICHARD P. MOSES, EXECUTORS OF THE ESTATE OF MRS. MIRIAM B. MOSES, DECEASED,

PETITIONERS

versus

THE MANUFACTURERS LIFE INSURANCE COMPANY,

RESPONDENT

RESPONDENT'S BRIEF ON PETITION FOR WRIT OF CERTIORARI

The Respondent hereby opposes the Petitioners Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit entered herein March 10, 1969.

QUESTIONS PRESENTED

The Respondent does not agree that the questions herein presented raise any constitutional question or issue and that the questions presented are simply as follows:

1. Was there any substantial evidence upon which the jury could properly find a verdict for the Petitioners?

2. Did the Honorable United States District Court

commit prejudicial error in the exclusion of evidence and the refusal of requested instructions?

STATEMENT OF THE CASE

On December 12, 1949, Mrs. Miriam B. Moses was issued a contract by the Respondent called a Guaranteed Retirement Pension Plan (Trial Ex. 1) for an annual premium of One Thousand Fourteen and 90/100 ($1,014.90) Dollars whereby basically it agreed to pay to her Fifty ($50.00) Dollars per month beginning December 12, 1960, for ten (10) years and thereafter until her death; that in the event of her death prior to maturity it would pay the greater of the sum of the premiums or the stated cash value of Eleven Thousand Six Hundred Ninety-five ($11,695.00) Dollars to her named beneficiary or to her Executors, as may be applicable. On the last page or cover of the contract, there appears the notice shown in Petitioners' Appendix at page 39.

By agreement between Mrs. Moses and the Respondent, the contract was extended for five years from its initial maturity date upon the payment of the same annual premium, thereby increasing the agreed monthly sum to be paid to Eighty Seven and 63/100 ($87.63) Dollars and the cash value upon maturity, to the sum of Eighteen Thousand Four Hundred Ten ($18,410.00) Dollars. The maturity date was extended to December 12, 1965.

On August 23, 1965, Mrs. Moses wrote the Respondent for information in connection with her contract which was to mature December 12, 1965, (Trial Ex. 2c). Thereafter, there was considerable correspondence between Mrs. Moses and the Respondent (Trial Ex. 2C through 2J). As a result of this correspondence, Mrs. Moses executed and mailed to the Respondent her option selection

and waiver of surplus interest form filled out in her own handwriting. (Trial Ex. 2K and 2L)

As a result of the correspondence referred to above, Mrs. Moses selected an option to receive payments under her contract in the sum of One Hundred Four and 94 100 ($104.94) Dollars payable monthly unguaranteed and to terminate at the time of her death (Trial Ex. 2K and 2L).

The contract matured December 12, 1965, and thereafter checks were forwarded to Mrs. Moses monthly in the amount of One Hundred Four and 94 100 ($104.94) Dollars commencing December 12, 1965, and continuing through June 12, 1966, the time of Mrs. Moses' death. All of these checks were accepted and cashed by her except two of the same which were cashed by her Executors following her death.

The issues were tried before the Honorable Donald Russell in the United States District Court for South Carolina, Columbia Division. The Respondent moved for a directed verdict which motion was denied and the issues submitted to the jury which returned a verdict in Plaintiff's favor. The Respondent then moved for judgment non obstante verdicto, which motion was granted by Order of the United States District Judge filed April 30, 1968, (27a). On Appeal to the United States Circuit Court of Appeals for the Fourth Circuit, the Order of the District Judge was affirmed March 10, 1969, (38a).

ARGUMENT

The Petitioners apparently contend that the Order granting judgment n.o.v. in itself deprived the Petitioners of the constitutional guarantee of trial by jury in violation of the Seventh Amendment to the Constitution of the United States. It is well settled, however, that the grant-

ing of a judgment n.o.v. does not, of itself violate the guarantee of a jury trial. *Montgomery Ward & Co. v. Duncan,* 311 U. S. 243, 85 L. Ed. 147, 61 S. Ct. 189. *Neely v. Eby Construction Co.,* 386 U. S. 317, 18 L. Ed. 2d 75, 87 S. Ct. 1072; and *Manaia v. Potomac Elec. Power Co.,* C.A. Md. 1959, 268 F. 2d 793, (4th Cir.), certiorari denied 80 S. Ct. 255, 361 U. S. 913, 4 L. Ed. 2d 183.

Therefore, it appears to the Respondent that there is no constitutional question involved and that the only issues presented by the Petitioners to this Court are those hereinabove set forth. The evidence before the Court was objectively considered by the District Court in the light most favorably to the position of the Petitioners. The District Judge in his Order (27a) stated, "Following denial of its motion for a directed verdict and a jury verdict in plaintiff's favor, the defendant has renewed its motion for judgment n.o.v. In considering such motion for judgment in accordance with the defendant's prior motion for direction of verdict, all issues of fact, as well as inferences therefrom, are to be viewed in a light most favorable to the position of the plaintiffs."

Not only was this evidence reviewed objectively but sympathetically as the District Judge also in his Order stated, "Sympathetic as I may be with the plaintiffs, I am of the opinion that the motion of the defendant should be granted."

The District Judge in his Order fully and completely examined and discussed all of the evidence presented on behalf of the petitioners and also the evidence which was ruled inadmissible during the trial.

On Appeal to the United States Court of Appeals for the Fourth Circuit, all of the evidence and the rulings of

the District Judge were carefully re-examined and his Order affirmed. (38a).

The Petitioners' position is similar to that discussed by the Circuit Court of Appeals for the Fourth Circuit in the case of Manaia v. Potomac Elec. Power Co., Supra, in which the Court says:

> "Finally, it is said that granting these judgments n.o.v. was a denial of the plaintiffs' rights under the Seventh Amendment. It is apparent from their brief, however, that the learned counsel for the plaintiffs have no deluding impression that this contention adds anything of substance to their position. They seem to recognize that no constitutional question arises when the court withdraws from the jury a case in which there is no issue of fact requiring the jury's determination. The power of the court to withdraw such cases from the jury is too firmly rooted in history and tradition for frontal attack. Nor do the parties here suggest that the power be allowed to atrophy, for its employment within its well defined boundaries is a protective restriction as unecessary to to vigorous functioning of the jury system as preservation of the prerogatives of the jury. The contention does not question the established principles; it merely seeks an obscuring injection of the linguistics of constitutional principle into the familiar process of appraisal of evidence and its associated inferences.
>
> "Were a court indifferent to the established basis upon which powers have been allocated between the court and jury or beguiled into rejection of every view which seemed to it less reasonable than its own, a violation of constitutional right might well be said to have occurred. The District Court, here, however, was conscious of the limitations of its power, and

conscientious and objective in its exercise. Citing Burcham v. J. P. Stevens & Co., 4 Cir., 209 F. 2d 35, he approached the problem 'in the light of the admonition of the Court of Appeals of this Circuit as to the limited authority of trial judges to disturb jury verdicts,' as do we. (163 F. Supp. 672). Even the plaintiffs describe his approach as 'fairminded.' The attempt, therefore, to glamorize the problem by an invocation of the Seventh Amendment is, at best, an irrelevance contributing nothing to the objective disposition of such questions as this."

In discussing a similar situation in the case of Dick v. New York Life Ins. Co., 359 U. S. 437, 3 L. Ed. 2d 935, 79 S. Ct. 921, Mr. Justice Frankfurter had this to say:

"What are the questions which petitioner here presses upon us? The petition for certiorari sets forth as the questions presented: (1) was petitioner deprived of her contsitutional right to a jury trial guaranteed by the Seventh Amendment? (2) did the Court of Appeals refuse to follow North Dakota law as it was required to do under Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 ALR 1487? If this case raises a question under the Seventh Amendment, so does every granted motion for dismissal of a complaint calling for trial by jury, every direction of verdict, every judgment notwithstanding the verdict. Fabulous inflation cannot turn these conventional motions turning on appreciation of evidence into constitutional issues, nor can the many diversity cases sought to be brought here on contested questions of evidentiary weight be similarly transformed by insisting before this Court that the Constitution has been violated. This verbal smoke screen cannot obscure the truth that all that is involved is an ap-

praisal of the fair inferences to be drawn from the evidence.' Chief Judge Magruder has expressed the common sense of the matter:

'If an appellate court is of the view that the trial court made an error of judgment in withdrawing a case from the jury, or in entering judgment for the defendant notwithstanding a plaintiff's verdict, a reversal (by a Court of Appeals) is no doubt called for; but we cannot see that anything is gained by blowing up that error of judgment into a denial of the constitutional right to a jury trial as guaranteed by the Seventh Amendment.'"

In further discussing the propriety of granting Writs of Certiorari on solely evidentiary issues Justice Frankfurter in the same opinion had this to say:

"However, if we are to review facts, we must establish and adhere to a rational standard of review. In so doing we cannot ignore the relevance to this task of the many expressions of the impropriety of such review. If it is unwise for this Court to grant review of cases turning solely on question of fact, how much less wise to undertake to reassess the record in disregard of the reasoned assessment of the evidence by the Court of Appeals.

'The same considerations that should lead us to leave undisturbed, by denying certiorari, decisions of Courts of Appeals involving solely a fair assessment of a record on the issue of unsubstantiality, ought to lead us to do no more than decide that there was such a fair assessment when the case is here, as this is, on other legal issues.

'This is not the place to review a conflict of evi-

dence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fairminded judges could find it tilting either way.'

"It is the staple business of Courts of Appeals to examine records for the sufficiency of evidence. To undertake an independent review of the review by the Court of Appeals of evidence is neither our function nor within our special aptitude through constant practice. Such disregard of sound judicial administration is emphasized by the fact that the judges of the Court of Appeals are, by the very nature of the business with which they deal, far more experienced than we in dealing with evidence, ascertaining the facts, and determining the sufficiency of evidence to go to a jury."

The Petitioners base their appeal for this Writ solely on the contention that both the District Court and the Circuit Court of Appeals have so far departed from the accepted and usual course of proceedings as to call for an exercise of this Court's power of supervision. This is in no way substantiated by the record herein or in the Petitioners' argument.

The evidence consisted principally of written communication between Petitioners' decedent and the Respondent all of which was presented to the Trial Court and carefully considered by both it and the Circuit Court of Appeals. As stated in the Order of the District Court (27a) the evidence and all inferences therefrom were considered in the light most favorable to the Petitioners. The accepted and usual course of proceedings was followed throughout the trial in the District Court and the appeal to the United States Circuit Court of Appeals for the Fourth Circuit.

CONCLUSION

For the reasons hereinabove set forth, it is respectfully submitted that the Petition for the Writ of Certiorari to the Court of Appeals for the Fourth Circuit should be denied.

Respectfully submitted,

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